Supreme Court, U.S.
FILED
JUN 7 - 2010
OFFICE OF THE CLERK

No. 08-1515

IN THE

Supreme Court of the United States

GOLDEN GATE RESTAURANT ASSOCIATION,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

SAN FRANCISCO CENTRAL LABOR COUNCIL, *et al.*,
Intervenors / Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO SOLICITOR GENERAL'S BRIEF

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QUESTION PRESENTED

Whether ERISA section 514(a), 29 U.S.C. § 1144(a), preempts local laws mandating ongoing employer contributions for employee health benefits, or alternative payments to a local government, and extensive recordkeeping and reporting and disclosure requirements, a question on which the courts of appeals are in conflict.

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In accordance with Supreme Court Rule 15.8, Petitioner respectfully submits this Reply to the Solicitor General's Brief.

I. INTRODUCTION.

In the Ninth Circuit, the Department of Labor filed an amicus brief arguing, correctly, that this case raises "an important question" and that the employer mandate in San Francisco's Ordinance is completely preempted by ERISA because it requires employee

benefit structures or their administration and it interferes with uniform plan administration. Labor Secretary's Amicus Brief at 1, 8-9. After the panel upheld the Ordinance, the Department of Labor took a full month to consider the court's opinion, then filed a second amicus brief supporting Petitioner's request for a rehearing en banc and arguing, once again correctly, that this case raises "a recurring issue of exceptional importance," that the Ordinance is clearly preempted because it mandates employee benefit structures or their administration and interferes with uniform plan administration, and that the panel's decision conflicts with *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), and with this Court's ERISA preemption cases. Labor Secretary's Brief in Support of Rehearing ("DOL Rehearing Brief") at 7, 14-17.

In the 19 months that have since passed, the government has had a change in administration and a change of heart, at least in part. In this Court, the Solicitor General and the Department of Labor now argue that the ERISA preemption question in this case is not very important and that the Circuit conflict may merely reflect "tension" between the Fourth and Ninth Circuits. Significantly, however, they do not reverse themselves on the underlying legal merits – they do not claim that the San Francisco Ordinance actually survives ERISA preemption.

They seek to justify their partial reversal by asserting that passage of the Patient Protection and Affordable Care Act,[1] as amended[2] (the "PPACA"),[3]

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[1] Pub. L. No. 111-148, 124 Stat. 119.

[2] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

reduces the likelihood that state and local governments will adopt new employer spending requirements. But the only affirmative evidence bearing on this theory tends to refute it. San Francisco's Mayor and Department of Public Health Director have recently vowed to keep the City's health care program under the Ordinance intact because they say it is needed to fill "holes" in PPACA's coverage.

By reversing itself in part to now advocate that the Ninth Circuit's departure from ERISA preemption law be allowed to stand, the government unintentionally amplifies the need for clarification by this Court that ERISA preempts state and local mandates—regardless of whether the mandates are for benefits or contributions—and that local jurisdictions may not pass laws that balkanize the regulation of employee benefit plans. The Court therefore should grant the petition and decide the important question presented by this case.

II. THE PPACA DOES NOT COUNSEL AGAINST GRANTING THE PETITION.

The Solicitor General invokes Congress's recent passage of the PPACA to make a two-fold argument against granting the Petition.

First, the SG argues that because the PPACA "will almost certainly significantly increase health care coverage" in the United States, the new law "make[s] it much less likely that States and localities will

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[3] The House Office of the Legislative Counsel has created a consolidated document that integrates the original and amending provisions of Public Law Nos. 111-148 and 111-152 into a single text. *See* http://www.ncsl.org/documents/health/ppaca-consolidated.pdf.

choose to adopt their own health care programs." SG's Brief at 15. This according to the SG "reduces substantially the ongoing importance of the question whether ERISA preempts state and local health care programs like the [Ordinance]." *Id.* We respectfully disagree with the government on at least two levels.

At the most basic level, the government's position is undermined by the very party the government seeks to support. Twice since Respondent filed its opposition brief, San Francisco's Mayor and Department of Health Director have publicly stated their commitment to maintaining San Francisco's health care program under the Ordinance, which they say is vitally needed to fill "major holes" in the new federal program.[4] The Mayor's rationale for maintaining the Ordinance applies with equal force to every state and major city in the country. The government offers no reason to believe that other cities or states will not want to establish their own fill-the-holes programs.

At a broader level, it is important to keep in mind that the Ninth Circuit's rationale is not limited to health care programs. It can be applied with equal force to other welfare benefit programs, even to

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[4] *See* Heather Knight, *Healthy San Francisco Expected To Continue*, S.F. Chron., Mar. 23, 2010, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/03/23/MN4V1CJO00.DTL ("[O]n Monday, Mayor Gavin Newsome and Public Health Chief Mitch Katz said they are dedicated to ensuring the viability of Healthy San Francisco because major holes in the national plan, if signed into law, will leave out thousands of local residents."); Victoria Colliver, *National Plan Wouldn't Mean End of Healthy S.F.*, S.F. Chron., Nov. 23, 2009, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/11/23/MNC31ALDNM.DTL (noting similar point being made by San Francisco Department of Public Health Director).

pension programs. It is difficult to overstate the importance of the issue.

Second, the Solicitor General argues that the PPACA *might* bear on whether the Ordinance is preempted, so therefore the Court should decline to hear the case now. SG's Brief at 15. But the PPACA itself does not preempt state and local "play or pay" laws, nor does it exempt them from ERISA's preemption regime. Petitioner's Supp. Brief at 2-7. It is silent.

The government's argument, nonetheless, invites readers in opaque language to assume that state or local employer mandates like San Francisco's *may* qualify for official sanction under the PPACA's provisions establishing "insurance exchanges" and, if so, *may* be saved from ERISA preemption. But the government never quite explains how this is possible, and a review of the statutory text shows that it plainly is not.

The PPACA sections cited by the government require the states or, upon their failure to act, the federal government to establish insurance exchanges through which individuals and small businesses can purchase health insurance that meets minimum specified coverage standards. *See* PPACA §§ 1311(b), 1321(c); *see also* Brian Kopp et al., "New Federal Health Care Reform Legislation – Its Impact on Employers and Employee Benefit Plans," 10 *Bender's Labor and Employment Law Bulletin* 197, 201 (May 2010). After 2016, states may apply for a "waiver" of

certain statutory requirements "with respect to health insurance coverage." PPACA § 1332(a)(1).[5]

Contrary to the government's speculation, nothing in the PPACA's waiver provision so much as hints that a state or local government may adopt a "play or pay" mandate as part an alternative program that can be removed from ERISA's preemptive reach through a waiver. A waiver can only be granted if the Secretary of the Health and Human Services makes certain determinations that meet statutory criteria, none of which contemplate the existence of a state or local "play or pay" program. To ensure that the government ***cannot*** grant the very waiver the SG's brief suggests might be available, the statute affirmatively provides: "The Secretary may not waive under this section any Federal law or requirement that is not within the authority of the Secretary." PPACA § 1332(c).

This last point is worth considering further, because it completely refutes the government's argument that 29 U.S.C. section 1144(d)—which provides that nothing in ERISA's general preemption rule in section 1144(a) shall be construed to "impair" any other federal law—might be implicated by a PPACA

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[5] The applicable statutory requirements are those: (i) relating to the "qualified health plans" and "essential health benefits" that must be available for purchase through the state insurance exchanges, PPACA §§ 1301 to 1304; 1401(a) (adding new 26 U.S.C. § 36B), 1402; (ii) governing the establishment and maintenance of the insurance exchanges themselves, *id.* §§ 1311 to 1313; and (iii) contained in the employer and individual mandates that the PPACA adds to the Internal Revenue Code, *id.* §§ 1501(b) (adding new 26 U.S.C. § 5000A); 1513 (adding new 26 U.S.C. § 4980H). *See* PPACA § 1332(a)(2).

waiver. PPACA section 1332(c) expressly precludes that possibility. There is no credible basis for claiming that the San Francisco Ordinance and similar employer mandates might be shielded from ERISA preemption under these or any other provisions of the PPACA.

The government additionally argues that San Francisco's Ordinance *may* be preempted by the PPACA because it is a local law that might not be captured by the PPACA's savings clause, which merely references "state" laws, not local laws. *See* PPACA § 1321(d).[6] But under this Court's existing cases, it appears that the reference to "state" laws includes local laws, in the absence of a clear expression of congressional intent to the contrary. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991) (holding that federal statute expressly allowing "State" regulation but remaining silent on local laws does not contemplate preemption of local laws); *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002) (following *Mortier* even when the statutory scheme uses the phrase "a State or political subdivision of a State" in one section and the lone term "State" in another). Even if the Ordinance is not saved by section 1321(d), the fact that it is separately preempted by the PPACA is not a reason for the Court to avoid resolving the conflict in the circuits over the straightforward and important question of whether ERISA trumps "play or pay" laws such as the Ordinance.

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[6] Section 1321(d) is discussed at greater length in Petitioner's Supplemental Brief, and provides: "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title."

III. CONTRARY TO ITS CURRENT POSITION, THE DEPARTMENT OF LABOR PREVIOUSLY HAD NO DIFFICULTY SEEING THE PANEL'S INCORRECT APPLICATION OF THIS COURT'S ERISA PREEMPTION CASES OR THE CONFLICT WITH *FIELDER*.

In this Court, the government devotes more than four pages to arguing that the panel's decision does not "directly" conflict with either this Court's ERISA decisions or the Fourth Circuit's decision in *Fielder*, which the government now says is merely in "tension" with the panel's decision. SG Brief at 17-21. But the government's argument is completely undermined by the far more persuasive case to the contrary that the government made in the Ninth Circuit.

There, the Department of Labor made two simple and devastating points. First, the Department explained, under this Court's ERISA preemption cases, "29 U.S.C. § 1144(a) is 'intended to ensure that plans *and plan sponsors* would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives *among states* or between states and the Federal Government . . . [and to prevent] the *potential for conflict* in substantive law.'" DOL Rehearing Brief at 14 (emphasis, ellipses and brackets supplied by Labor Department) (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) and citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001)). The Ninth Circuit, the Department explained, failed to consider the potential for conflict with "play or pay" laws that other jurisdictions have enacted or considered, and instead imposed an impermissible

burden on plan sponsors and administrators to monitor, coordinate and comply with differing obligations. *Id.* at 15.

Second, the Department quoted from *Fielder* at length to demonstrate that the Fourth Circuit's decision was not based solely on its conclusion that the only way to comply with the Maryland law was to adopt or amend an ERISA plan. As the Department's brief cogently explained:

> The court reasoned that because 'the vast majority of any employer's health care spending occurs through ERISA plans . . . the primary subjects of the [law] are ERISA plans, and any attempt to comply with the [law] would have direct effects on the employer's ERISA plans.' *Id.* The court further reasoned that 'a proliferation of similar laws in other jurisdictions would force [employers] to monitor these varying laws and manipulate [their] healthcare spending to comply with them, and that such efforts would deny covered employers a uniform nationwide administration of their healthcare plans.' *Id.* at 197.

DOL Rehearing Brief at 17 (brackets and ellipses supplied by Labor Department). The Department then explained that the Ninth Circuit's decision was in conflict with *Fielder* because it "failed to address the Fourth Circuit's conclusion that even if an employer has meaningful ways to comply with a healthcare spending requirement without affecting ERISA plans, the law is still preempted because of its interference with the employer's ability to administer a uniform nationwide healthcare plan." *Id.* Earlier this term, this Court made very similar "uniformity" points in articulating ERISA's "guiding principles." *Conkright v. Frommert*, 130 S. Ct. 1640, 1648-51

(2010); *see* Petitioner's Supplemental Brief at 7-9 (discussing *Conkright*).

Nothing the government says in its brief now even comes close to detracting from the compelling points it previously advanced in the Ninth Circuit. Moreover, the Solicitor General's argument here that "the Fourth Circuit's view that the Maryland law would disrupt uniformity of plan administration also reflected in part that court's conclusion that the state-payment option was not a realistic alternative for Wal-Mart" is completely refuted by the government's brief in the court below. *Compare* SG Brief at 19 *with* DOL Rehearing Brief at 17.

IV. THE GOVERNMENT'S FOCUS ON A REGULATION THAT THE LABOR DEPARTMENT NEVER PROMULGATED IS WHOLLY MISPLACED.

The government notes that the Labor Department considered, but decided not to promulgate after the PPACA's passage, a regulation "'clarifying the circumstances under which health care arrangements established or maintained by state or local governments for the benefit of non-governmental employees do not constitute an employee welfare benefit plan' covered by ERISA." SG Brief at 12. Had it done so, the government argues, the regulation would have been entitled to *Chevron* deference. *Id.* at 12-13. From this the government asks the Court to draw two inferences: that the contemplated regulation "*could* have altered the preemption analysis in this case" and that the government's decision not to proceed supports its contention that the PPACA re

duces the importance of the question presented in this case. Neither inference is warranted.

First, whether the contemplated regulation "could" have altered the preemption analysis is irrelevant, as the Department never adopted it. In the absence of a genuine legislative regulation that satisfies each *Chevron* element, the government's flip-flop on the issues, occurring within the same case no less, precludes it from receiving any deference whatsoever. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (holding that government's flip-flop in case where agency litigating position is "wholly unsupported by regulations, rulings, or administrative practice" not entitled to deference). Moreover, it is hard to imagine a regulation of the sort mentioned by the government that properly could circumscribe ERISA's preemptive scope under 29 U.S.C. section 1144(a).

Second, the government neglects to mention that its published notice of intended rulemaking provoked strong criticism from the ERISA and business communities.[7] It is at least as inferable that the proposed regulation was dropped in response to the criticism as it was due to a belief that the importance of ERISA's preemption of "play or pay" laws was reduced by the PPACA's passage.

V. CONCLUSION.

The government's argument that the PPACA reduces the need for granting the Petition holds no

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[7] A letter protesting the proposed regulation from the American Benefits Council and 12 other organizations representing plan sponsors, for example, can be found at http://americanbenefitscouncil.org/documents/erisa_omb-letter032910.pdf.

water. Its other arguments fare even worse, toppling mostly from the pull of the government's earlier opposing positions on the same points. Telling in the government's brief is what it does not say – it does not argue that the Ordinance survives ERISA preemption. This is a remarkable concession by the government given the weakness of the arguments it does make. The question presented in this case and the conflict in the circuits remains urgently in need of resolution. The new position taken by the government, if anything, increases the necessity for this Court to clarify the scope of ERISA preemption, especially in the context of a state or local government imposing new employer mandates, the scope of which can be determined only by reference to ERISA covered employee benefit plans.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

As the Petition demonstrates, the Ninth Circuit's decision, unless reversed, will undermine ERISA's central purpose of having federal law, not state or local law, regulate the design, funding and administration of employee benefit plans. The decision will effectively nullify Congress's goal of fostering the growth and development of a purely voluntary system of cost-effective plans with nationally-uniform benefits, benefit levels and administrative practices governed by a single body of federal law.

In the sharpest of conflicts with ERISA, the "pay-or-play" and "fair-share" laws require the "'tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction,'" *see, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001), while upending ERISA's purpose of "minimiz[ing] the need for interstate employers to administer their plans differently in each State." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 (1983).

ERISA's preemptive scope ensures that plan sponsors may enjoy economies of scale in setting up and administering a nationally-uniform system of employee benefit plans. Nationally-uniform plans may provide better benefits and higher payment levels than smaller, localized plans set up and administered on a person-by-person or location-by-location basis. If state or local laws shatter these economies of scale, the additional high costs of healthcare and administration services ultimately will fall on the workers' shoulders in the form of less benefits, *see, e.g., Egelhoff*, 532 U.S. at 149-150, lower wages, or fewer jobs, all contrary to ERISA's goals.

Respondent's opposition ignores these overarching ERISA considerations in favor of a parochial "San Francisco first" approach. In so doing, Respondent attempts to raise emotional appeals and distracting non-issues, while steadfastly denying the dramatic conflict between the Fourth and Ninth Circuits. Respondent also tries, unsuccessfully, to defend the Ninth Circuit's decision which, through incorrect readings of the statute and case law, subverts rather than upholds this Court's carefully-crafted ERISA preemption standards and the important ERISA goals they protect.

Properly viewed, Respondent's arguments spotlight the compelling reasons this Court should grant, not deny, the Petition.

I. THIS CASE PRESENTS A QUESTION THAT IS BOTH RECURRING AND OF EXCEPTIONAL NATIONAL SIGNIFICANCE

Respondent argues that Petitioner greatly exaggerates the impact of the Ninth Circuit's decision. (Brief in Opposition ("Opposition"), 31-35). Respondent misses the mark.

Larger forces are at play than just San Francisco's Health Care Security Ordinance. There is a clear conflict between the Fourth and Ninth Circuits on whether ERISA preempts "pay-or-play" or "fair-share" laws, and employers as well as states, cities and counties need to know what they can and cannot do. Under currently harsh economic conditions, more and more jurisdictions will likely experiment with healthcare reform models and employer mandates similar to San Francisco's local clinic-based program until there is definitive Supreme Court guidance.

Eight of the Ninth Circuit Judges dissenting from the denial of *en banc* rehearing recognized this crucial point. Concluding that "this case concerns an issue of exceptional national importance," they observed that the "panel decision creates a 'road map for state and local governments' seeking to regulate employee health plans despite ERISA's preemptive scope." (App. at 58a, 49a (citation omitted)). Similarly, the Secretary of Labor accurately stated in her *amicus* brief supporting rehearing: "this case raises a recurring issue of exceptional importance concerning the extent to which ERISA permits recent attempts by state or local governments to require employers

to pay for or provide medical benefits for their employees" (*id.* at 72a).

Two preeminent ERISA scholars have singled out the Fourth and Ninth Circuit decisions as worthy of close study and contrast. Edward A. Zelinsky, "Employer Mandates and ERISA Preemption: A Critique of *Golden Gate Restaurant Association v. San Francisco*," Cardozo Legal Studies Working Paper No. 246, 31 (2008), *available at* http://ssrn.com/abstract=1299128 ("Zelinsky Working Paper 246") ("At some point, it will be necessary for the Supreme Court to resolve the conflict represented by *Fielder* and *Golden Gate II*"); John H. Langbein, *et. al*, *Pension & Employee Benefit Law* (4th ed. 2006) (2009 Supplement, containing both the *Fielder* and *Golden Gate II* texts, the only opinions reprinted other than Supreme Court opinions). *See also* Joshua Waldbeser, Case Note: *"Golden Gate Restaurant Association v. . . . San Francisco*: Setting the Stage for Supreme Court Review of the Most Important Preemption Matter in the History of ERISA," 41 J. Marshall L. Rev. 995 (2008).

As of 2006, "pay-or-play" laws and "fair-share" laws had been proposed or were under consideration by at least 30 states as well as local jurisdictions across the country.[1] Seven "pay-or play" or "fair-share" laws have already been enacted (Hawaii; San Francisco; Massachusetts; Vermont; Maryland (struck down); Suffolk County (struck down); New York City (not enforced due to concerns over ERISA preemption).[2] In view of the sharply conflicting decisions from the

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[1] Julia Contreras and Orly Lobel, "Wal-Martization and the Fair Share Health Care Acts," 19 St. Thomas L. Rev. 105, 136 (2006).

[2] *Id.*; Petition at 6.

Fourth and Ninth Circuits, many proposals are on "hold."

All eyes are now on this Petition for Writ of Certiorari to see whether this Court will intervene. If not, it is reasonable to expect a far more rapid growth in "pay-or-play" and "fair-share" laws from coast-to-coast.

II. THIS IS AN APPROPRIATE CASE FOR SUPREME COURT REVIEW

Because of the emotional tone in Respondent's Brief in Opposition, a few words of background are necessary to clear the air about the appropriateness of this case for Supreme Court review.

Notwithstanding Respondent's quibbles (Opposition, 35-37), this case contains a detailed and fully-developed record sufficient for this Court to decide the question presented. The District Court ruled on the Ordinance in an exhaustive manner (App. at 83a-103a), as did the Ninth Circuit, twice (App. at 1a-40a, 41a-61a).

Respondent states that there has been a "health care crisis" in San Francisco; the Ordinance has caused the "number of uninsured" to decline by tens of thousands; and reversal of the Ninth Circuit's decision will have a devastating impact because the employer-contribution mandate is an "interlocking component[]" with the "public" program. (Opposition, 1, 37). These assertions are overstated, unsupported and, above all, irrelevant to the Petition.

Respondent concedes that prior to the Ordinance, roughly 90% of medium and large businesses in San Francisco provided employee health insurance. (Opposition, 3). This suggests that the real problem

has not been a healthcare crisis at the employer level. Rather, it suggests that the difficulty is San Francisco wants to provide more generous healthcare benefits to all of its residents than its tax base will sustain.

The Health Access Plan ("HAP") established by the Ordinance is not insurance. Nor is it portable. The HAP consists of local clinics for city residents. The "Healthy San Francisco" website summarizes its limitations correctly:

> Healthy San Francisco is not insurance. . . . The program does not include vision or dental care. If you receive medical care outside of San Francisco for any reason, Healthy San Francisco will not pay for it.[3]

Respondent's claim that San Francisco's public health program will be devastated if the Ninth Circuit's decision is reversed is not true. The City's published statistics show that the overwhelming majority of HAP funding comes not from employer contributions, but from local taxes, grants and other San Francisco revenues.[4] Moreover, employer contributions to HAP equal less than four-tenths of one percent of the City's annual budget.[5] "Healthy San Francisco" is not at risk.

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[3] www.healthysanfrancsisco.org, last visited on Aug. 25, 2009.

[4] *See* July 2009 Status Report on the Implementation of the San Francisco Health Care Security Ordinance; at 13, 16 ($113.2 million funding; with $22.643 million from employers), *available at* www.healthysanfrancisco.org/about-us.Reports.aspx.

[5] Mayor's Proposed City Budget 2009-2010, 21 ($6.6 billion budget), www5.2/gov.org/.../2009/...mayor-newsom-releases-2009.

Respondent also attempts, unsuccessfully, to argue that the ERISA preemption issue will become moot if national healthcare reform legislation is enacted. (Opposition, 39). None of the federal proposals deals with preemption of state and local employer mandates either through an amendment to ERISA or otherwise.[6] The Fourth Circuit and Ninth Circuit decisions will remain in sharp conflict.

Further, if there is a legislative stalemate, the ERISA preemption issue will become even more acute because additional state and local governments may feel compelled to enact "pay-or-play" or "fair-share" laws based on a "tested" model such as San Francisco's Ordinance. Respondent never explains how the nation's employee benefit plan system and the employer community will survive if 50 states and over 38,000 counties, cities and towns experiment with various types of "pay-or-play" or "fair-share" laws.

If, as San Francisco urges,[7] states, cities and counties follow its model of local clinics with employer mandates, the results will also be draconian. First, there will be an enormous disruption of a nationally-uniform and cost-effective system of employee benefit plans that is ERISA's paradigm. Second, when a person with protection similar to the HAP travels to another city, county or state, the clinic's protection is left behind. Each local jurisdiction will be providing only basic clinic care for its own residents. All of this

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[6] A proposed amendment to H.R. 3200 provides an ERISA preemption waiver for certain state single-payer systems.

[7] Jason Dearen, "Federal Court Upholds San Francisco Healthcare Program," *Los Angeles Times*, Sept. 30, 2008 (quoting City Attorney Dennis Herrera).

will lead to a balkanization and shrinkage of employee healthcare, the opposite of ERISA's goal.

San Francisco's conundrum illustrates that healthcare reform is a national problem—one perhaps best resolved by affordable health insurance coupled with tax-incentives and subsidies—that requires national healthcare and health insurance reforms, all in harmony with ERISA's goal of allowing cost-effective, nationally-uniform employee benefit plans.

III. THIS COURT SHOULD PROMPTLY RESOLVE THE CONFLICT BETWEEN THE FOURTH AND NINTH CIRCUIT DECISIONS

Respondent denies any conflict between the Ninth Circuit's decision and *Retail Indus. Leaders Assoc. v. Fielder*, 473 F.3d 180 (4th Cir. 2007). Respondent overlooks most of the *Fielder* court's analysis and ignores the many similarities between the laws considered in each case.

The Fourth Circuit explained that under the Maryland statute, "the only rational choice employers have . . . is to structure their ERISA healthcare plans so as to meet the minimum spending threshold." *Fielder*, 473 F.3d at 196. San Francisco employers spending less than the mandated amounts on an existing plan will feel compelled to raise their expenditures, just as in *Fielder*. Those paying nothing will also feel compelled to establish a healthcare plan matching the Ordinance's rate, just as in *Fielder*. In both cases, a rational employer is likely to conclude that because the local-government program produces either no benefit for employees (Maryland), or a local-clinic benefit that is not insurance and not portable (San Francisco), the appropriate response is to raise the

existing contribution level, or establish a new plan, to square with the law. Each rational employer, whether in Maryland or San Francisco, must design or abandon plans using the local law as the yardstick. Although there is a difference between the laws, it is only a difference in degree.

While the Fourth Circuit concluded the Maryland Act offered no reasonable alternative for employers to comply without altering an ERISA plan, it pointedly rejected the one-dimensional litmus test adopted by the Ninth Circuit. As explained by Respondent, the Ninth Circuit held that a local jurisdiction may impose any restriction or obligation on a plan sponsor as long as the law contains a "reasonable" alternative to compliance that does not require the sponsor to create or alter an existing ERISA plan. (Opposition, 8, 11, 14).

ERISA preemption does not turn on alternatives to compliance. Citing *Egelhoff*, 532 U.S. at 151, the Fourth Circuit correctly held that a "state law that directly regulates the structuring or administration of an ERISA plan is not saved by inclusion of a means of opting out of its requirements. *Fielder*, 473 F.3d at 192. Although Respondent now contends that this issue was "not presented to, or considered by, the Ninth Circuit" (Opposition, 16), eight dissenting Judges from the denial of rehearing *en banc* properly criticized the panel decision for attempting to ignore this portion of *Fielder*'s holding, a portion that demonstrates the very conflict the panel tried to deny. (App. at 54a-55a).

IV. THIS COURT SHOULD PROMPTLY REAFFIRM THAT ERISA PREEMPTS LAWS MANDATING EMPLOYER CONTRIBUTIONS FOR EMPLOYEE BENEFITS

Respondent also contends that the San Francisco Ordinance escapes preemption because, in its view, ERISA preempts only laws relating to employee benefits, but not laws mandating employer contributions (or "expenditures" as Respondent prefers to say) necessary to fund the benefits. (Opposition, 24-31). The Ninth Circuit's distinction between "benefits" and "contributions" is sophistry. Professor Zelinsky carefully explains that this distinction "does not withstand analysis":

> There is no support in the statute or in the Supreme Court's case law for this benefits/ contributions distinction . . . .[8]
>
> The San Francisco ordinance does not merely "relate to" ERISA plans. The ordinance intrudes deeply and comprehensively into such plans, even more deeply and comprehensively than did the Maryland Wal-Mart law.[9]

This Court should promptly intervene in order to reaffirm and apply the proper ERISA preemption standard it has carefully-framed over the past 25 years. In protecting ERISA's goal of cost-efficient, uniform nationwide plans, this Court has held that ERISA preempts *all* state and local laws, such as the Ordinance, that "prohibit" what is "permitted" by federal law, *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658

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[8] Zelinsky Working Paper 246, 20.

[9] *Id.* at 29.

(1995), "mandate[] employee benefit structures", *id.*, require a sponsor to create, alter or amend an ERISA plan, *Egelhoff*, 532 U.S. at 145-146, or impose "different regulations on plans and plan sponsors from jurisdiction to jurisdiction," regardless of the existence of an "opt out" provision, *id.* at 145-146.

Similarly, ERISA preempts all state and local laws—similar to the Ordinance—mandating employer contributions for group health-insurance, with a non-compliance penalty, *e.g.*, *Standard Oil Co of Calif. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *summarily aff'd*, 454 U.S. 801 (1981), requiring plans to provide specific types of benefits, *Shaw*, *supra*, or requiring employers to provide benefits equal to a specific standard, *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129-130 (1992).

Further, Respondent argues that the Ordinance escapes ERISA preemption because it operates only indirectly on employers and employee benefit plans, similar to the New York fee-surcharge statute in *Travelers, supra*. (Opposition, 12). Professor Zelinsky pinpointed this error with accuracy:

> San Francisco's employer mandate is explicitly and narrowly targeted only at employers and their health care plans, whether these plans self-insure, purchase coverage from insurers or other providers, make ongoing payments to the City, or do some combination of these.
>
> . . .
>
> This employer mandate is no less direct and targeted because it decrees the contributions which

employers' plans must receive rather than the benefits such plans must pay.[10]

The Ordinance also violates the "connection with" and "reference to" prongs of ERISA's preemption standard because the City-payment-option itself requires the creation of an ERISA plan. The employer's ongoing-contributions to HAP and compliance with a maze of recordkeeping and reporting and disclosure rules establish an ERISA health "plan, fund, or program" for its employees financed "through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). For ERISA's purposes, an employer's HAP-contributions are indistinguishable from premium payments to an insurance company or a PPO for health-coverage that result in an ERISA plan.[11]

In arguing the City-payment-option does not involve an ERISA plan, Respondent simply repeats a fundamental error by the Ninth Circuit. (Opposition, 20-21).[12] For an ERISA plan to exist, there is no requirement that the employer hold trust fund assets

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[10] Zelinsky Working Paper 246, 27.

[11] *Id.* at 8.

[12] Respondent also asserts that the Ordinance escapes preemption because it "is utterly indifferent to whether an employer has an ERISA plan." (Opposition, 15). The ERISA preemption standard is not "indifference" but this Court's fine-tuned standard, described above. Further, a primary purpose of the Ordinance's contribution-mandate is to encourage employers to retain existing ERISA plans, thus avoiding a flight to less expensive public options ("crowding out") (*see Amicus* Briefs of Zazie and Medjool Restaurants for Respondent, 26). Petitioner presented unrebutted evidence to the District Court showing that Respondent's Board of Supervisors believed and intended that the Ordinance would help to avoid this effect. (Declaration of Patrick Sutton, Document 57, filed 8/3/07).

for ERISA to protect from mismanagement. The Ninth Circuit seized on ERISA's general prohibitions against employer mismanagement of plan assets to read into ERISA's broad definition of "employee welfare benefit plan" a limitation that Congress itself chose not to insert. Most ERISA-covered employee welfare benefit plans, including insured and PPO-modeled healthcare plans, do not involve the handling of plan assets.[13] The Ninth Circuit's theory is a "classic legal argument which proves too much" since very few, if any, insured health-plans, third-party administered plans, or HMO-plans would be ERISA-covered under this restrictive standard."[14]

Lastly, Respondent protests that Petitioner's City-payment-option argument lacks authority. (Opposition, 19-23). The Secretary of Labor's *amicus* brief,[15] however, and Paul J. Ondrasik, *et al.*, "ERISA Preemption and State Health Care Reform," Infrastructure, Vol. 47, No. 4, 4 (2008) American Bar Association, concluded that an employer's use of the City-payment-option creates an ERISA plan within the statutory definition, thus triggering preemption. After a detailed analysis, Professor Zelinsky concluded that a Supreme Court holding that ERISA preempts the Ordinance, based on an application of the statutory definition to the City-payment-option, is "the most compelling of the possible dispositions."[16]

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[13] *See, e.g., Qualls v. Blue Cross of California*, 22 F.3d 839 (9th Cir. 1994); *Brundage-Peterson v. Compcare Health Services Ins. Co.*, 877 F.2d 509, 511 (7th Cir. 1989).

[14] Zelinsky Working Paper 246, 13, 16, 19.

[15] App. at 85-86a.

[16] "*Golden Gate III*, ERISA Preemption, and the San Francisco Health Care Security Ordinance," Cardozo Working Paper No. 261 (Apr. 2009), 16, *available at* http://ssrn.com/abstract=1396356.

CONCLUSION

For the foregoing reasons, as well as on the grounds advanced in the Petition and by the *amici curiae*, a Writ of Certiorari should issue to review the opinion of the Ninth Circuit in this case.

Respectfully submitted,

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September 8, 2009